No. 78-308

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

MOBAY CHEMICAL CORPORATION, *Appellant,*

v.

DOUGLAS COSTLE, *Administrator,*
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellee.

On Appeal from the United States District Court for the Western District of Missouri

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SUPPLEMENTAL MEMORANDUM

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SUPPLEMENTAL MEMORANDUM

This memorandum is filed to show that the Court has jurisdiction to entertain this appeal under 28 U.S.C. § 1253, and § 2282, since the suit was brought to restrain "the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States."

I

In its Amended Complaint, Mobay expressly challenged the validity of a specific provision of P.L. 94-140, 89 Stat. 751, 755, which amends Section 3(c)(1)(D) of the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. § 136(c)). In the section of

the Amended Complaint entitled "Alleged Violations," Mobay asserted (p. 45) that "This limitation"—referring to the specific limitation of Section 3(c)(1)(D) to data submitted on or after January 1, 1970—"deprives plaintiff of its property without due process of law and effects a governmental taking of plaintiff's property for a private purpose and without just compensation in violation of the Fifth Amendment to the Constitution of the United States."

In the section of the Amended Complaint entitled "Relief Requested," Mobay asked that a "Three-Judge Court . . . grant plaintiff . . . equitable relief . . . on the grounds that that segment of Section 3(c)(1)(D) of FIFRA, as amended by Section 12 of Public Law 94-140, 94th Cong., 1st Sess., 89 Stat. 751, which limits the applicability of Section 3(c)(1)(D) to data submitted '. . . on or after January 1, 1970 . . .' is unconstitutional as to plaintiff in that such limitation deprives plaintiff of its property without due process of law and effects a governmental taking of plaintiff's property for private purposes and without just compensation in violation of the Fifth Amendment to the Constitution of the United States."[1] (Amended Complaint, pp. 47-48.) And finally, Mobay asserted that (Amended Complaint, p. 49):

> Plaintiff states that the injunctive relief prayed for in this Paragraph [enjoining EPA from considering Mobay data without permission or offer of compensation] would restrain the operation and execution of an Act of Congress for repugnance to the Constitution of the United States within the meaning of 28 U.S.C. Section 2282 which requires that such relief be granted by a Three-Judge Court convened and constituted as provided in 28 U.S.C. § 2284.

These sections quoted from the Amended Complaint show that Mobay directly challenged, on a constitutional basis, the validity of the 1975 amendment to FIFRA.[2] Mobay clearly requested an "injunction restraining the enforcement, operation or execution of [an] Act of Congress for repugnance to the Constitu-

[1] "An injunction seeking to restrain the operation of a statute as to a particular plaintiff is an action for 'an injunction restraining . . . execution' of a federal statute under 28 U.S.C. § 2282. *Schneider* v. *Smith*, 390 U.S. 17 (1968); *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U.S. 977 (1957); *Harrison* v. *McNamara*, 228 F. Supp. 406 (D.C. Conn. 1964), *aff'd*, 380 U.S. 261 (1965)." *Melendez* v. *Shultz*, 486 F.2d 1032, 1033, n.2 (1st Cir. 1973).

[2] Thus, this is not a case involving the principle that "Where constitutional attack is directed solely against administrative action and does not implicate an Act of Congress" a three-judge court is not properly convened. (Motion to Affirm, p. 5, n.7). In so far as administrative action by EPA is involved, it is action directly in accordance with, and required by, the statute. This was shown by the Government itself in the "Defendant's Notice of Intention to Conform Stipulation and Agreement with Public Law 94-140, 89 Stat. 751," which it filed in the district court in this case on June 29, 1976. It there stated that "In order to bring defendant's procedures *into compliance with Public Law 94-140* and *to effectuate Congressional intent*, defendant . . . will . . . register applications [from other applicants] which rely on plaintiff's data if such data were submitted prior to January 1, 1970 . . ." (Emphasis supplied.)

The Government concedes that the constitutionality of the statute is drawn into question. See cases cited in Motion to Affirm, p. 11, n. 14, and in particular, *Sardino* v. *Federal Reserve Bank of New York*, 361 F.2d 106, 115 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966), where the Second Circuit stated: "Acts of Congress are not self-enforcing and when the executive or administrative action complained of is so plainly directed or permitted by the statute that no fair construction could hold otherwise, . . . the constitutionality of the statute is necessarily drawn into question." (Citations omitted.)

tion of the United States . . ." 28 U.S.C. § 2282. This is not a case of administrators acting on their own. On the contrary, the actions complained of in the Amended Complaint are precisely those contemplated and directed by the statute. Thus, the validity of the statute is directly called into question. The three-judge court was properly convened.[3]

II

The Government also mentions the possibility (Motion to Affirm, p. 11, n. 14) that the Tucker Act, 28 U.S.C. § 1491, might provide Mobay an adequate remedy at law, and that, on this ground, the "three-judge

[3] This case involves a direct challenge to the constitutionality of a Federal Act. The policy Congress wished to further in creating Section 2282 is applicable here: "To prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order," *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154 (1963), or, put another way, the saving of state and federal statutes from "improvident doom" at the hands of a single judge. *Phillips* v. *United States*, 312 U.S. 246, 251 (1941).

This case does not involve enjoining an "administrative order" as distinguished from "Acts of Congress." *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 173-174 (1939). Nor is it a case where either no challenge was made to a federal statute or no injunction sought. See, *e.g.*, *Del Bourgo* v. *Mansfield*, 300 F. Supp. 500 (N.D. Cal. 1967), *on remand*, 300 F. Supp. 502 (N.D. Cal. 1968) (challenge to administrative forms as misleading and depriving plaintiff of rights); *Woodward* v. *Rogers*, 344 F. Supp. 974 (D. D.C. 1972), *aff'd*, 486 F.2d 1317 (D.C. Cir. 1973) (challenge only to administrative action requiring oath of allegiance as prerequisite to issuance of a passport); *Grutka* v. *N.L.R.B.*, 409 F. Supp. 133 (N.D. Ind. 1976) (no specific challenge made to any provision of federal statute as unconstitutional). Nor is this action brought merely to restrain an administrator who had "acted with too heavy a hand." *Sardino* v. *Federal Reserve Bank of New York*, *supra*, at 115-116.

court arguably was improperly convened under the former 28 U.S.C. 2282." This suggestion, as the government itself concludes, has no merit. The Court has noted that a three-judge court is properly convened when "the complaint at least formally alleges a basis for equitable relief." *Idlewood Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962) (per curiam).[4] The Amended Complaint clearly did that and more. (See Section I, *supra*.) The Court said in *Morales* v. *Turman*, 430 U.S. 322, 324 (1977), that the jurisdictional issue should be determined as a "threshold question," and not as "one depending upon the shifting proof during litigation, injecting intolerable uncertainty and potential delay into important litigation."

This was the basis on which this Court proceeded in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). The ultimate determination there that a Tucker Act remedy was available, and that injunctive relief was therefore not available, did not render a three-judge court improperly convened, nor deprive this Court of jurisdiction. Here, as in the *Rail Reorganization Act Cases*, there is a substantial question as to the availability and adequacy of any remedy under the Tucker Act.

Among other things, the circumstances surrounding the adoption of this particular legislation leave it far from clear that Congress squarely contemplated the requirements of the Fifth Amendment, and that it

[4] The other criteria mentioned in *Idlewood* to determine whether a three-judge court is properly convened are also present here: *i.e.*, the constitutional question raised is substantial (*see* Jurisdictional Statement and *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973)) and the case otherwise comes within the requirements of the jurisdictional statute. (*See* Jurisdictional Statement, pp. 1-2.)

would have enacted the limitation provision of Section 3(c)(1)(D) if it had understood that it involved a "taking." That question must be resolved before the Tucker Act comes into operation, and it is clearly a substantial question. Moreover, use by the Government of an unascertainable number of the petitioner's trade secrets on behalf of an unknown number of private companies, present and future applicants, is incapable of valuation within the meaning of the Fifth Amendment. Thus, monetary damages cannot provide adequate relief in the particular circumstances of this case.

CONCLUSION

This Court has jurisdiction under 28 U.S.C. §§ 1253 and 2282. The questions presented are substantial and novel. Probable jurisdiction should be noted.

Respectfully submitted,

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